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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 198

ROBERT R. COX, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

No. 199

ETHEL K. CHILDERS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals in the *Childers* case (R. 46-53) is reported in 39 B. T. A. 904. In the *Cox* case only a short memorandum

opinion was filed (R. 22), in which the Board referred to the opinion in the *Childers* case as being controlling. The single opinion rendered by the Circuit Court of Appeals for the Tenth Circuit in both cases (R. 61-66) is reported in 110 F. (2d) 934.

JURISDICTION

The judgments in both cases were entered by the Circuit Court of Appeals on April 4, 1940 (R. 66-67). The petition for writs of certiorari was filed July 2, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The single question in each case is whether, under the particular trust instrument involved, the donor retained sufficient dominion over the corpus or the income of the trust to warrant taxing him with respect to the income therefrom.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 11-14.

STATEMENT

Each of the petitioners transferred property in trust by agreements dated May 16, 1932. In one, hereinafter referred to as the Cox trust, Robert R. Cox is the donor and Robert R. Cox and E. K. Childers are the trustees. In the other, hereinafter referred to as the Childers trust, E. K.

Childers is the donor and E. K. Childers and Robert R. Cox are the trustees. (R. 13, 36.)

The Cox trust instrument provides that the trustees shall pay one-half of the net income derived from the trust estate to Robert R. Cox during his lifetime, and that designated fractional parts "of all net income not paid to said Robert R. Cox shall be paid" to the other beneficiaries (R. 14). The Childers trust instrument provides that one-tenth of the net income received by the trustees after December 31, 1932, shall be paid to E. K. Childers during her lifetime, and that designated fractional parts "of all net income not paid to said E. K. Childers shall be paid" to the other beneficiaries (R. 38, 45).

The trust instruments contain many provisions common to both. Each provides that during the lifetime of the donor, the trustees may, in their sole discretion, pay to any beneficiary only part of his or her income, and that the balance shall be held and accumulated by the trustees for future distribution to such beneficiary in such amount and at such time as shall be determined solely by the trustees. (R. 16, 39.)

Each provides that (R. 16, 39):

In case the Net Income from the Trust Estate allotted for the benefit of any beneficiary hereunder is at any time or times insufficient, in the opinion of the Trustees, for the comfort, maintenance and/or education of such beneficiary, the Trustees may

pay out from time to time such sums from the principal as in their sole discretion may be necessary for such purpose or purposes.

Each provides that during the minority of any beneficiary entitled to receive income, payment of the whole or of any part thereof may in the sole discretion of the trustees be withheld (R. 16, 39).

Each provides that the trustees may determine the mode in which expenses are to be borne as between corpus and income, and which moneys or property of the trust estate shall be treated as corpus and which shall be treated as income, and that such determination shall be conclusive and binding upon all persons (R. 19, 42-43).

Each provides that the trustees shall, from time to time as they deem advisable, invest and reinvest the trust estate in certain specified types of securities. Each further provides that during the lifetime of the donor the trustees may invest and reinvest the trust estate in the unsecured notes of any individual approved by the donor, as trustee, or in the unsecured notes or bonds of any corporation, firm, or syndicate, in which the donor is at the time a stockholder, partner, or member, and that the trustees shall not be liable for any loss resulting to the trust estate from or on account of any such investments approved by the donor, as trustee. (R. 18, 42.)

The Cox trust instrument provides that Robert R. Cox, as trustee, shall make any and all invest-

ments of the trust estate in his sole discretion, shall have the custody of all securities, funds, and other property of the trust estate, and shall make all payments and distributions provided thereunder while he is such trustee (R. 19). The Childers trust instrument makes the same provision with respect to E. K. Childers, as trustee (R. 43).

The Cox trust instrument provides that in all matters wherein any discretion is granted the trustees by the trust instrument, the decision of the trustee Robert R. Cox shall be conclusive and binding upon both trustees, and on all beneficiaries thereunder (R. 19). The Childers trust instrument makes the same provision respecting decisions of E. K. Childers, as trustee (R. 43).

Paragraph six of each trust instrument, as amended June 11, 1932, provides that "This agreement, and the Trust hereby created, may be altered, amended, and/or revoked, in whole or in part, at any time, and from time to time, by the Donor, in conjunction with any other beneficiary" then *sui juris* and having a substantial adverse interest in the disposition of the corpus of the trust or the income therefrom, and that in the event of a complete revocation, the entire corpus and all accumulated income shall be transferred and delivered to the donor (R. 21, 46).

The Cox trust instrument provides that upon the death of the donor, the trust shall terminate and the accumulated income then in the hands of the

trustees shall be distributed to the beneficiaries entitled to receive the same, and the corpus paid over in certain designated proportions to named beneficiaries, or, in the event of the death of a named beneficiary prior to such termination, to his or her lawful issue (R. 16-17).

The Childers trust instrument contains the same provision, except that instead of providing for the distribution of accumulated income, it provides that it shall be added to the corpus and the whole divided into five equal parts and distributed to five named beneficiaries, or, in the event of the death of a named beneficiary prior to such termination, to his or her lawful issue (R. 40).

The beneficiaries named in the Cox trust instrument, in addition to the donor, are his wife, two daughters, a son, a brother and a cousin (R. 14-15). At the termination of the trust, one-half of the estate is to be paid to the wife, and one-sixth to each of the donor's children (R. 17).

The beneficiaries named in the Childers trust instrument, in addition to the donor, are her son, her daughter, two sisters and a sister-in-law (R. 38-39). At the termination of the trust, the corpus is to be paid in equal shares to each of these beneficiaries (R. 40).

The Commissioner determined that the entire net income of each trust for the year 1934 was taxable to the donor thereof and he assessed deficiencies against each petitioner accordingly (R. 13, 22,

36, 50). His action was sustained by the Board (R. 22, 53-54) and the court below affirmed (R. 66-67).

ARGUMENT

The court below held that the income from the trust in each case was taxable to the grantor; it relied for its decision upon both Section 166 and Section 22 (a) of the Revenue Act of 1934. The decision with respect to both sections is, we believe, plainly correct and accords with the applicable decisions of this Court, as well as with the decisions of other circuit courts of appeals.

1. The holding of the court below that the income of the trust was taxable to the grantor under Section 166 was based on the specific provisions of the particular trust instruments involved, which the court interpreted as giving each grantor power to vest in himself title to the whole of the corpus. Somewhat similar trust instruments were similarly construed in *Rollins v. Helvering*, 92 F. (2d) 390 (C. C. A. 8th), certiorari denied, 302 U. S. 763, and in *Fulham v. Commissioner*, 110 F. (2d) 916 (C. C. A. 1st).

Petitioners urge that this aspect of the decision is in conflict with *Higgins v. White*, 93 F. (2d) 357 (C. C. A. 1st). That case, however, involved a funded insurance trust with a trust company as co-trustee; the primary application of the income was to the payment of premiums on life insurance policies. Examination of the provisions of the

trust indenture, as set forth in the opinion of the court, shows plainly that the power retained by the grantor to control disposition of the corpus was in no way comparable with the power retained by the grantors here. The Circuit Court of Appeals for the First Circuit, which decided *Higgins v. White*, subsequently held that decision to be inapplicable to a case where the grantor of the trust retained substantial domination over the corpus. *Fulham v. Commissioner, supra*. Since the trusts here involved are similar in character to the trust in the *Fulham* case, petitioners' claim of conflict with *Higgins v. White* seems plainly unfounded.¹

2. The holding of the court below that the income was taxable to the petitioners under Section 22 (a) as well as under Section 166 is clearly a correct application of this Court's decision in *Helvering v. Clifford*, 309 U. S. 331. There, as here, the Board of Tax Appeals found that the donor of the trust had failed to relinquish dominion over the corpus of the trust and that the trust income was, therefore, taxable to him under Sections 166 and 167. In view of the broad powers retained, the close family relationship, and other pertinent circum-

¹ *Higgins v. White* was decided prior to the action of this Court in denying certiorari in *Rollins v. Helvering, supra*. A supplemental brief was filed by the petitioner in the *Rollins* case (Nos. 603-607, October Term, 1937) for the specific purpose of showing conflict between the *Higgins* and *Rollins* cases, but this Court denied certiorari.

stances, this Court concluded that the result reached by the Board should be affirmed under the provisions of Section 22 (a).

Petitioners seek to distinguish the *Clifford* decision upon the ground that the beneficiaries and donors here cannot be considered a "family group" (Pet. 8). Except for the relatively negligible interest of one-fortieth of the income given to one cousin in the Cox trust (R. 15), the sole beneficiaries under both trusts are the spouse, the children and the brothers and sisters of the respective donors. This seems clearly to be a family group. In any event, the close family relationship existing in the *Clifford* case was merely one of the factors which pointed towards the conclusion that sufficient dominion was retained to warrant the tax.

There is no basis for petitioners' contention (Pet. 18) that the court below was precluded from considering Section 22 (a) because the Board of Tax Appeals had based its decision upon the provisions of Section 166. In *Helvering v. Gowran*, 302 U. S. 238, this Court specifically held that a Circuit Court of Appeals may *affirm* a decision of the Board of Tax Appeals upon a theory not presented to or considered by the Board. *Helvering v. Wood*, 309 U. S. 344, cited by petitioners, deals with the power of an appellate court to reverse on a ground not presented or considered below. That case is inapplicable here.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1940.

